No. 82-1802

In The
Supreme Court of the United States
October Term, 1982

IN THE MATTER OF ORVILLE E. HANSEN,
Debtor.

FIRST NATIONAL BANK OF TEKAMAH, NEBRASKA,
Petitioner,

vs.

ORVILLE E. HANSEN and VIRGINIA HANSEN,
Respondent.

REPLY BRIEF OF PETITIONER

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I. The District Court does not have jurisdiction of this adversary proceeding under 28 U. S. C. § 1331.

Respondent contends that even if *Marathon* invalidated the whole of § 1471, the District Court[1] nevertheless

[1]How the District Court managed to acquire original jurisdiction over this adversary proceeding, even if it had a valid

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has jurisdiction of this adversary proceeding under 28 U. S. C. § 1334 and 28 U. S. C. § 1331.

We have already addressed the infirmities of founding jurisdiction of this action upon § 1334. We will not repeat those arguments here except to state that Respondent's "revivor" arguments do not attempt to address the question of how the unamended version of this statute can be "revived" when the amended version has been made effective by § 405(b)(2) and the amendment has not been declared invalid. Nor does Respondent attempt to explain how the summary jurisdiction created by this statute, even if it is in force, suffices to fulfill the plenary jurisdictional needs of this adversary proceeding.

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statutory grant, is a mystery that no court has yet explained since the Complaint was filed only in the Bankruptcy Court invoking *only* the jurisdiction of that court. Even if the two courts had concurrent original jurisdiction, the commencement of this action in the Bankruptcy Court did not automatically and simultaneously vest original jurisdiction in the District Court. A grant of concurrent jurisdiction simply vests different courts with equal power over the same "subject matter" and enables litigants to resort, in the first instance, to *either* court indifferently. *Mallory v. Paradise,* 173 N. W. 2d 264, 267 (Iowa 1969). Once the original jurisdiction of the Bankruptcy Court was invoked, the only jurisdiction which the District Court could exercise in this matter was appellate jurisdiction and then only after this appeal was properly taken. Thus, when the Bankruptcy Court's original jurisdiction became invalid, that Court could not transfer jurisdiction of this case to the District Court. A court which lacks subject matter jurisdiction cannot validly invest another court with jurisdiction by transferring a case to it. See *Freeman v. Bee Machine Co.,* 319 U. S. 448, 449, 63 S. Ct. 1146, 1147, 87 L. Ed. 1509 (1943); *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.,* 258 U. S. 377, 42 S. Ct. 349, 66 L. Ed. 671 (1922); *Winters Nat. Bank v. Schear Group,* 24 B. R. 463, 469 (Bk. Ct. S. D. Ohio 1982); *In re Motion to Dismiss,* 23 B. R. 334, 344-345 (Bk. Ct. N. D. Ga. 1982); *In re Century Entertainment Corp.,* 6 C. B. C. 753 (Bk. Ct. S. D. Ohio 1982).

Section 1331 also provides no basis for the District Court to exercise original jurisdiction over this adversary proceeding (neither the District Court nor the Circuit Court found that it did).[2] The separate historical backgrounds of this "federal question" statute and the various Bankruptcy Acts that have been enacted over the years, as well as the fact that, notwithstanding the presence of § 1331 in the United States Code, statutes granting subject matter jurisdiction over bankruptcy matters have always been specially enacted by Congress[3] demonstrate conclusively that Congress never intended § 1331 to serve as a jurisdictional statute for bankruptcy. See discussion in *In re Richardson,* Bk. No. 82C-00736, Civ. No. 82PC-0746 (Bk. Ct. D. Utah 1983) rev'd on other grounds 10 B. C. D. 182 (D. Utah 1983). See also *In re Conley,* 10 B. C. D. 10, 16 (Bk. Ct. M. D. Tenn. 1983) and *In re Paul C. Wildman,* Bk. No. 81-B-5869, Mem. Op. at pgs. 48-50 (Bk. Ct. N. D. Ill., May 6, 1983).

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[2]The federal question statute could not possibly have been intended as an alternate source of bankruptcy jurisdiction either prior to or at the time of enactment of the 1978 Bankruptcy Reform Act since it was not until 1980 that Congress eliminated the amount in controversy requirement from that statute by Pub. L. 96-486. Moreover, federal question jurisdiction applies only when federal law provides the rule of decision. Many controversies involving bankrupts are governed by state law only. Cf. *Northern Pipeline Co. v. Marathon Pipe Lines,* — U. S. —, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982); *Bardes v. First National Bank of Hawarden,* 178 U. S. 524 (1900).

[3]Cf. *Romero v. International Terminal Operating Co.,* 358 U. S. 354 (1959) finding that the separate enactments of admiralty jurisdiction statutes, both before and after the creation of the federal question statute, indicates that Congress did not intend the latter statute to serve as a jurisdictional basis for admiralty suits.

Section 1331 is inconsistent with the Bankruptcy Reform Act of 1978 and could not have been intended to serve as a source of bankruptcy jurisdiction:

1. if § 1331 were available as a source of jurisdiction, parties would have had the unacceptable option of invoking the trial jurisdiction of the district court in bankruptcy cases and adversary proceedings in lieu of the exclusive original jurisdiction granted to the bankruptcy courts by § 1471(c), a result which is directly contrary to the intent of Congress in enacting the Bankruptcy Reform Act;

2. § 405(a)(1) of the 1978 Bankruptcy Reform Act identifies § 1471 as the *only* source of bankruptcy jurisdiction for both the district courts and bankruptcy courts during the transition period; had Congress intended § 1331 (or § 1334 for that matter) to serve as an equally available source of jurisdiction, § 405(a)(1) would have made reference to that statute; and

3. irreconcilable conflict exists between the venue and removal provisions that must be used in § 1331 cases (§ 1391-1407 and § 1441) and the venue and removal provisions of the Bankruptcy Reform Act (§ 1472-1477 and § 1478).

In short, Section 1331 was never intended to provide jurisdiction over bankruptcy matters and, because of the structure of the Bankruptcy Act of 1978, it cannot do so now.

II. The Writ should be granted to resolve the conflict between the lower federal courts.

In Point I of their Reasons For Denying The Writ, Respondents take issue with Petitioner's Statement that

there is "much dispute and disagreement between the lower courts" as to whether there is continuing original jurisdiction of bankruptcy matters after *Marathon*, and Respondents deny that "both litigants and the courts [are] in a state of confusion." Respondents then point to the uniformity among the decisions of the circuit and district courts which have upheld district court jurisdiction of bankruptcy matters after *Marathon*. In so doing, Respondents have ignored entirely the *directly contrary* positions taken by numerous bankruptcy courts (see cases cited at footnote 6 of the Petition) and the uncertainty and conflict in the decisions that have recently been rendered by the Circuit Courts.[4]

For example, on April 6, 1983 a panel of the Sixth Circuit entered an opinion in *White Motor Corporation v. Citibank, N. A.*, 10 B. C. D. 392 (6 Cir. April 1, 1983) holding that *Marathon* had invalidated *only* subsection (c) of § 1471. Ten days later, a different panel of the same Court, albeit in dicta, found that *Marathon* had not invalidated only subsection (c), but had invalidated § 1471 "in its entirety." See *Rhodes v. Stewart*, No. 81-5820 (6 Cir. April 11, 1983).

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[4]*See, e. g., In re Anthony J. Bassak*, No. 82-2443 (7 Cir. 1983) dismissing a bankruptcy appeal as premature and stating that "in view of the current uncertainties regarding the jurisdiction of the bankruptcy courts . . . we assume that the power exercised by the bankruptcy judge will not exceed that mandated *prior to* the enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (effective October 1, 1979)." (Emphasis added.) Had the Seventh Circuit agreed with the positions taken by the other circuits, this admonition would have been unnecessary. And see *Rhodes v. Stewart*, No. 81-5820 (6 Cir. April 11, 1983), discussed above.

As a result of these mixed signals, the bankruptcy courts in the Sixth Circuit have expressed confusion and dismay at the current state of uncertainty. In *Butz v. Society National Bank of Miami Valley, Adv.* No. 3-82-0571, Case No. 3-82-00546 (Bk. Ct. S. D. Ohio, May 9, 1983) the bankruptcy court held that because of the confusion and uncertainty in that circuit "no decision will be rendered in this case until Congress enacts remedial legislation as necessitated by the Northern Pipeline decision." In *In re Jorges Carpet Mills, Inc.*, 28 B. R. 6165 (Bk. Ct. E. D. Tenn. April 6, 1983) the bankruptcy court for the Eastern District of Tennessee, unaware that the *Rhodes* decision was about to be handed down five days later, reluctantly complied with *White Motor* by withdrawing its earlier decision which had found no jurisdiction after *Marathon* (reported at 27 B. R. 333), but in so doing the bankruptcy court stated that, contrary to the findings of *White Motor, Marathon* had decided "that district courts do not have jurisdiction under § 1471." Obviously, the bankruptcy court felt that it was precluded from following the *Marathon* holding because of the position taken by the circuit of which it is a part.

Other bankruptcy court decisions, published after the filing of this Petition, also demonstrate the conflict existing between the bankruptcy courts and the other lower federal courts.[5]

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[5]See e. g., *In re United Grocers Corporation*, Bk. No. 82-1513 (Bk. Ct. N. J., April 20, 1983) finding that "*Marathon* struck down the jurisdiction of both the bankruptcy and the district courts in § 1471 and that no other statute vests district courts with bankruptcy jurisdiction" and holding that the Emergency Rule adopted by the District Court was ineffective and invalid; and *In re Paul C. Wildman*, Bk. No. 81-B-5869 (Bk. Ct. N.D. Ill., May 6, 1983), discussed above.

Perhaps most exemplary of this conflict is the May 6, 1983 Order and Memorandum Opinion of the Honorable Richard L. Merrick entered in *In re Paul C. Wildman,* Bk. No. 81-B-5869 (Bk. Ct. N. D. Ill., May 6, 1983), holding that original subject matter jurisdiction does not exist after *Marathon* in *either* the bankruptcy courts or the district courts and dismissing fourteen separate bankruptcy cases and proceedings then pending in that court on Motions to Dismiss for lack of subject matter jurisdiction. The anger and frustration that rings out in Judge Merrick's Opinion is symptomatic of the deep division and conflict that exists in the courts today.

It is our understanding that as a result of entering this Order and Opinion, Judge Merrick, who is the President of the National Conference of Bankruptcy Judges, was relieved of his entire docket of Code cases by the District Court and is no longer permitted to act as a bankruptcy judge in such matters.

If this does not constitute "dispute and disagreement between the lower courts," we do not know what more is required.

In *Marathon,* the majority of this Court plainly stated that Section 241(a) of the 1978 Bankruptcy Act vested original jurisdiction in only a "single" court, the Bankruptcy Court, and that that "single statutory grant of jurisdiction," although invalid only in part, was not severable and, therefore, § 241(a) must be struck down in its entirety. The majority recognized that by invalidating the *sole* jurisdictional support for bankruptcy matters, the administration of the bankruptcy laws would be impaired until such time as Congress cured the lapse.

Congress has not acted. The lapse has occurred. The courts cannot fill the gap by rule, but those that have courageously said so, have been silenced.

If this Court did not mean what it said in *Marathon* or if this Court had no intention of enforcing the *Marathon* holding in any other case, then it has needlessly misled Judge Merrick and all other bankruptcy judges who took it at its word and who either sought the protection of insurance against personal liability or resigned or refused to act in the absence of mandamus or were relieved of their dockets by the district courts because of their interpretation of the *Marathon* holding[6]

We submit that, if for no other reason than to settle the conflict between the bankruptcy courts and their appellate superiors, the Court should grant this Petition so that both litigants and the courts will know if there is any jurisdictional basis remaining after *Marathon* for handling bankruptcy matters and so that the parties to this action will know whether this adversary proceeding can properly continue.

CONCLUSION

Petitioner has the right to have its property rights and claims for relief adjudicated by a court of competent jurisdiction, and, having been granted by Congress with a statutory right to appeal to the District Court from the judgment of the Bankruptcy Court, Petitioner is en-

[6]See footnote 9 of the Petition.

titled to the fundamenal elements of due process at both the trial *and* the appellate stages of this proceeding, which, *at a minimum,* would prohibit the *same* court, the District Court, from acting as *both* trial court and appellate court in the *same* proceeding, as is happening here. We again ask that the Petition be granted.

Respectfully submitted,

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